



Comptroller General  
of the United States

Washington, D.C. 20548

143549

## Decision

**Matter of:** Schlick America, Inc.

**File:** B-242165

**Date:** April 4, 1991

Robert J. Corcoran for the protester.  
Lester Edelman, Esq., Department of the Army, for the agency.  
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Protest that contracting agency improperly rejected the protester's proposal for noncompliance with the Buy American Act requirement for domestic construction materials because the contract allegedly was for the supply of equipment is denied where the record shows that the contracting agency properly classified the solicitation as a construction contract.
2. The General Accounting Office will not review an agency determination not to waive Buy American Act requirements since that Act vests discretion regarding such waivers in the head of the concerned agency.

### DECISION

Schlick America, Inc. protests the rejection of its proposal under request for proposals (RFP) No. DACA63-90-R-0047, issued by the United States Army Corps of Engineers, Fort Worth District, for the design and construction of "Corrosion Control Plastic Media Blasting Equipment" at Kelly Air Force Base, San Antonio, Texas. Schlick's proposal was rejected because it offered to furnish a foreign manufactured plastic media system, in violation of the RFP's Buy American Act clause, which required that only domestic construction materials be used under the contract. Schlick contends that this Buy American Act requirement should not have been applied.

We deny the protest.

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The RFP, issued on June 5, 1990, contained the clause set out in Federal Acquisition Regulation (FAR) § 52.225-5, which implements the Buy American Act, 41 U.S.C. § 10b (1988), requirement for domestic construction materials on construction contracts. By subsection (b) of the clause, the contractor agrees to use only domestic construction materials in the performance of the contract. Subsection (a) of the clause defines construction materials to be articles, materials, and supplies brought to the construction site for incorporation into the building or work. Subsection (a) further states that domestic construction material is unmanufactured construction material mined or produced in the United States, or construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the costs of all its components.

The Army received two proposals, including Schlick's, in response to the RFP. Schlick proposed plastic media blasting equipment that was manufactured in Germany. By letter dated October 31, the Army rejected Schlick's proposal since it proposed to use nondomestic construction materials.<sup>1/</sup>

Schlick argues that the Buy American Act requirement for domestic construction materials did not apply to the RFP because the Army is purchasing equipment, not construction, and the Buy American Act provisions governing supply contracts should be applicable. In this regard, Germany is a qualified or designated country under the Trade Agreements Act, 19 U.S.C. § 2501 et seq. (1988). The Department of Defense has provided that certain eligible products, including defense equipment, of qualified or designated countries may not be subject to the Buy American Act preference provisions. FAR § 25.402; Department of Defense, Federal Acquisition Regulation Supplement (DFARS) § 225.7403(a)(3)(i). The qualifying/designated country exception to the Buy American Act is expressly not applicable to construction contracts, however. FAR § 25.403(e).

Schlick argues that the RFP is for the supply of equipment, rather than construction. We disagree. Construction, for purposes of applying the Buy American Act restriction, is defined as construction, alteration, or repair of any public

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<sup>1/</sup> Since Schlick's system was totally foreign manufactured, the Army advises that the contracting officer determined that Schlick did not have a reasonable chance of receiving the award because the agency's time constraints did not permit Schlick to propose an acceptable alternative. Schlick does not contend that it would or could have proposed a domestic alternative.

building or public work, 41 U.S.C. § 10(b); see also FAR § 25.201. The Army advises:

"The plastic media bead blast system is not a piece of equipment or several pieces of equipment as normally implied by the term equipment. [The equipment] is a specialty system designed and constructed on site to complete the Corrosion Control Facility. The system consists of assorted mechanical components which are installed in the facility to perform a given task . . . ."

The Army reports that the procurement encompasses both the design and construction of a blasting system, which must be integrated into a hangar that will house the corrosion control facility.<sup>2/</sup> The Army reports that installing the equipment requires the use of many disciplines that equipment manufacturers normally do not possess, including laborers, carpenters, electricians, and truck drivers, and that a Davis-Bacon Act wage determination, which is applicable only to construction contracts and covers the labor categories to be used on this contract, was included in the RFP.

Our review of the record confirms that this procurement is part of an integrated effort involving the construction of a hangar and corrosion control facility.<sup>3/</sup> As we understand it, the contractor for this procurement will construct the blast system on site and install it as an integrated part of the hangar/corrosion control facility as these facilities are constructed and completed. The integration of other systems, such as for heating and air conditioning, into buildings is regarded as construction, see 46 Comp. Gen. 813 (1967) (water pump unit brought to construction site was construction material for a construction contract to install a central air-conditioning system in various buildings), and we see no reason why integration of the blast system should not be similarly viewed. Thus, we think the agency reasonably classified this RFP as one for construction.

The agency's view of this procurement as being for construction clearly was indicated in the RFP, which included:

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2/ The Army reports that the RFP is part of an over-all effort by the Air Force to build an aircraft facility totally equipped with corrosion control equipment for the removal of paint from aircraft, which involves building a hangar equipped with corrosion control equipment.

3/ Schlick does not dispute this description of the work, although it now asserts this was not an optimum procurement approach.

the clause implementing the Buy American Act requirement for construction materials.<sup>4/</sup> Since Schlick's proposal was based upon using German equipment as a construction material, it properly was rejected pursuant to this clause.

Schlick argues, in the alternative, that if the contract is one for construction, the Army should have considered its proposal because the plastic media equipment is not manufactured in the United States in sufficient quantity and quality. Under such conditions, the head of the contracting agency may authorize a waiver of the Buy American Act restriction that only domestic construction materials be used in United States construction contracts.<sup>5/</sup> See FAR §§ 25.202(a)(3), (b). The question of whether to waive the Buy American Act in any particular procurement involves balancing competing Buy American and foreign policies to determine what is in the public interest. See Rudel Machinery Co., Inc., B-224606, Nov. 6, 1986, 86-2 CPD ¶ 529. The Buy American Act clearly vests the discretion and authority to make the waiver decisions in the head of the agency, and we will not review determinations not to waive those requirements. Id. Schlick assumed the risk the Army would not process or grant this waiver when it proposed foreign equipment.

The protest is denied.

  
for James F. Hinchman  
General Counsel

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<sup>4/</sup> To the extent that Schlick complains that this clause should not have been included in the RFP, this contention is untimely under our Bid Protest Regulations, since Schlick did not protest this apparent alleged solicitation impropriety prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

<sup>5/</sup> Here, the Army advises that, at the outset, no reasonable basis existed for making a determination of this nature because there were at least five potential domestic companies capable of providing the plastic media blasting equipment.